Syarikat Perkapalan Selatan Sabah Sdn Bhd v State Government of Sabah & Ors

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO K79 OF 1990
SYED AHMAD IDID JC
9 OCTOBER 1990

Administrative Law — Administrative action — Judicial review — Locus standi of plaintiff

Administrative Law — Ultra vires — Condition imposed in timber licence or timber licence agreement — Whether permitted by statute — Condition requiring export of timber logs to be undertaken on vessels nominated and approved by body other than a forestry officer — Whether ultra vires statute — Forest Enactment 1968, ss 4, 24A & 42 — Sabah Foundation Enactment 1966, s 10

The plaintiffs made an application for an injunction restraining the third defendants from nominating or approving any vessel to carry timber logs for export from Sabah to any destination or in any manner from holding themselves out as the authority to regulate the export or carriage of timber logs from Sabah pending the hearing of the originating summons or until further order. By the originating summons, the plaintiffs sought, inter alia, the following orders:

(1) as against the first and second defendants, a declaration that in issuing timber licence agreements and licenses under the Forest Enactment 1968, the second defendant had no power to stipulate a condition that the licensee shall export timber through and by any vessel or vessels nominated and approved by the first defendant for the purpose to any destination and that any such condition in any timber licence agreements or licences issued or to be issued by the second defendant was ultra vires the Forest Enactment 1968 and was void and of no effect;
(2) a declaration that the appointment of the third defendants by the first defendant as the authority to nominate and approve vessels to carry logs for export from Sabah to any destination was unlawful, null and void, and of no effect whatsoever; and
(3) as against the third defendants, an injunction restricting and restraining the third defendants whether by themselves or their agents or servants or any of them or otherwise howsoever from nominating or approving any vessel to carry timber logs for export from Sabah to any destination or in any manner holding themselves out as the authority to regulate the export or carriage of timber logs from Sabah.

Pursuant to certain statutory provisions, the second defendant (the Director of Forestry in Sabah) included in timber licence agreements and licences issued under the enactment a condition the effect of which was that all timber in any form must be exported through vessels nominated and approved by the first defendants. By a power of attorney the first defendant appointed the Sabah Foundation of which the third defendants were trustees to nominate and approve vessels on behalf of the first defendant. Since the end of July 1990, the plaintiffs' applications for approval of vessels for the shipment of timber had been rejected by the third defendants without any reason given.

The plaintiffs brought the action to challenge the validity of the condition imposed by the first defendant and the appointment of the Sabah Foundation as the first defendant's agent. Another issue was as regards whether the plaintiffs had the locus standi to bring the action.

Held, granting the injunction against the third defendants and dismissing the applications against the other defendants:

(1) For a plaintiff to have locus standi, he must show that he is a 'person aggrieved'. In this case, the plaintiffs had a genuine private interest to be furthered and protected.

(2) The condition regarding the shipment of timber logs was within the provisions of s 42(1)(c)(i) of the Forest Enactment 1968 which relates, inter alia, to the transport and export of forest produce from the state. The condition was validly imposed and was not an infringement of nor ultra vires the Forest Enactment 1968.

(3) The plaintiffs' claim against the third defendants was not frivolous or vexatious. The Sabah Foundation Enactment 1966 did not provide for the Sabah Foundation to exercise powers under the Forest Enactment 1968. On the contrary, the powers stated in the Sabah Foundation Enactment 1966 may place the third defendants or the Sabah Foundation in conflict with the powers to 'nominate or approve vessels' provided in a condition imposed pursuant to the Forest Enactment 1968. It is implicit in the Forest Enactment 1968 that the administration of the forests and the general superintendence of all matters within the provisions of the Enactment must rest with the second defendant and that all duties under the Enactment rest with 'forest officers'. It was ultra vires the Forest Enactment 1968 for the first defendant to have appointed the Sabah Foundation as its donee to 'nominate and approve vessels' in respect of the condition imposed under the powers granted by the Forest Enactment 1968.

[Bahasa Malaysia summary

Plaintif membuat suatu permohonan untuk injunksi menghalang defendan ketiga daripada menamakan atau meluluskan sebarang vesel untuk mengangkut kayu balak bagi eksport daripada Sabah ke sebarang tempat atau dalam sebarang cara mengemukakan diri sebagai pihak berkuasa untuk mengawalselia ekport atau pengangkutan kayu balak daripada Sabah sementara menunggu pembicaraan saman pemula atau sehingga perintah lanjut. Melalui saman pemula, plaintif menuntut, antara lainnya, perintah-perintah berikutnya:

(1) terhadap defendan pertama dan kedua, suatu deklarasi bahawa dalam mengeluarkan perjanjian lesen membalak dan lesen-lesen di bawah Enakmen Hutan 1968, defendan kedua tidak ada kuasa untuk mensyaratkan suatu syarat bahawa pemegang lesen mesti eksport balak melalui dan oleh sebarang vesel atau vesel-vesel yang dinamakan dan diluluskan oleh defendan pertama untuk tujuan ke sebarang tempat dan bahawa sebarang syarat tersebut dalam sebarang perjanjian lesen membalak atau lesen-lesen yang dikeluarkan atau akan dikeluarkan oleh defendan kedua adalah ultra vires Enakmen Hutan 1968 dan adalah tak sah dan tidak berkesan;
(2) suatu deklarasi bahawa perlantikan defendan ketiga oleh defendan pertama sebagai pihak berkuasa untuk menamakan dan meluluskan vesel bagi mengangkut kayu balak untuk eksport daripada Sabah ke sebarang tempat adalah menyalahi undang-undang, batal dan tak sah dan tidak ada apa-apa kesan pun dan;
(3) terhadap defendan ketiga, suatu injunksi menyekat dan menghalang defendan ketiga sama ada melalui diri mereka atau agen atau orang suruhan mereka atau sesiapa daripada mereka atau melalui apa carapun daripada menamakan atau meluluskan sebarang vesel untuk mengangkut

kayu balak bagi eksport daripada Sabah ke sebarang tempat atau dalam sebarang cara mengemukakan diri mereka sebagai pihak berkuasa untuk mengawalselia eksport dan pengangkutan kayu balak daripada Sabah.

Berpandu kepada beberapa peruntukan statutori, defendan kedua (Pengarah Perhutanan di Sabah) memasukkan dalam perjanjian lesen membalak dan lesen-lesen yang dikeluarkan di bawah enakmen suatu syarat, kesannya adalah bahawa semua balak dalam sebarang bentuk mesti dieksport melalui vesel-vesel yang dinamakan dan diluluskan oleh defendan pertama. Melalui suatu surat kuasa wakil defendan pertama melantik Yayasan Sabah di mana defendan ketiga adalah pemegang amanah untuk menamakan dan meluluskan vesel-vesel bagi pihak defendan pertama. Semenjak akhir bulan Julai 1990, permohonan-permohonan plaintif untuk kelulusan vesel-vesel bagi pengangkutan kayu balak telah ditolak oleh defendan ketiga tanpa sebarang sebab diberi.

Plaintif membawa tindakan untuk mencabar keesahan syarat yang dikenakan oleh defendan pertama dan perlantikan Yayasan Sabah sebagai agen defendan pertama. Satu lagi isu ialah mengenai sama ada plaintif mempunyai locus standi untuk membawa tindakan.

Diputuskan, membenarkan injunksi terhadap defendan ketiga dan menolak permohonan terhadap defendan-defendan lain:

(1) Bagi sesuatu plaintif mempunyai locus standi, dia mesti menunjukkan bahawa dia adalah seorang yang terkilan. Dalam kes ini, plaintif mempunyai kepentingan persendirian yang asli untuk diteruskan dan dilindungi.

(2) Syarat mengenai pengangkutan kayu balak adalah dalam peruntukan s 42(1)(c)(i) Enakmen Hutan 1968 yang mengenai, antara lain, kepada pengangkutan dan eksport pengeluaran hutan daripada negeri itu. Syarat itu telah dikenakan secara sah dan bukanlah perlanggaran hak atau ultra vires Enakmen Hutan 1968.

(3) Tuntutan plaintif terhadap defendan ketiga bukanlah remeh dan menyusahkan. Enakmen Yayasan Sabah 1966 tidak memperuntukan untuk Yayasan Sabah menjalankan kuasa-kuasa di bawah Enakmen Hutan 1968. Di sebaliknya, kuasa-kuasa yang dinyatakan dalam Enakmen Yayasan Sabah 1966 boleh meletakkan defendan ketiga atau Yayasan Sabah dalam percanggahan dengan kuasa-kuasa untuk 'menamakan dan meluluskan vesel-vesel' yang diperuntukkan dalam syarat yang dikenakan berpandukan Enakmen Hutan 1968. Adalah tersirat dalam Enakmen Hutan 1968 bahawa pentadbiran hutan dan pengawasan am semua perkara dalam peruntukan-peruntukan Enakmen terletak dengan 'pegawai hutan'. Adalah ultra vires Enakmen Hutan 1968 bagi defendan pertama untuk melantik Yayasan Sabah sebagai penerima dermanya untuk 'menamakan dan meluluskan vesel' berkenaan dengan syarat yang dikenakan di bawah kuasa-kuasa yang diberi oleh Enakmen Hutan 1968.]

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 01-73-90 and the third defendants have cross-appealed vide Civil Appeal No 02-472-90.]

Cases referred to

1 *Associated Tractors Sdn Bhd* v *Chan Boon Heng & Anor* [1990] 2 MLJ 408 (refd)
2 *Re Sidebotham, ex p Sidebotham* (1880) 14 Ch D 458 (refd)
3 *Buxton & Ors* v *Minister of Housing and Local Government* [1960] 3 All ER 408 (refd)
4 *Government of Malaysia* v *Lim Kit Siang* [1988] 2 MLJ 12 (refd)
5 *Tan Sri Othman Saat* v *Mohamed bin Ismail* [1982] 2 MLJ 177 (refd)
6 *Boyce* v *Paddington Borough Council* [1903] 1 Ch 109 (refd)
7 *Periasamy a/l Sangili* v *Datuk S Samy Vellu* [1990] 2 CLJ 282 (refd)
8 *Gregory & Anor* v *London Borough of Camden* [1966] 2 All ER 196 (refd)
9 *Gouriet* v *Union of Post Office Workers* [1977] 3 All ER 70 (refd)
10 *Pengarah Tanah & Galian Wilayah Persekutuan* v *Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (folld)
11 *Palmco Holdings Bhd* v *Commissioner of Labour & Anor* [1986] 1 MLJ 492 (refd)
12 *Fawcett Properties Ltd* v *Buckingham County Council* [1960] 3 All ER 503 (refd)
13 *Tsakiroglou & Co* v *Noblee Thorl* [1960] 2 QB 318 (refd)
14 *American Cynamid Co* v *Ethicon Ltd* [1975] 1 All ER 504 (folld)
15 *Tinta Press Sdn Bhd* v *Bank Islam Malaysia Bhd* [1987] 2 MLJ 192 (refd)

Legislation referred to

Delegation of Powers Enactment 1963 s 3
Forest Enactment 1968 ss 3, 4, 15, 24A, 42
Sabah Foundation Enactment 1966 s 10
Rules of the High Court 1980 O 18 r 11, O 41 r 5

Gerald Math Lee Min for the plaintiffs.
Juprin Wong Adamal for the first and second defendants.
Douglas C Primus for the third defendants.

Cur Adv Vult

Syed Ahmad Idid JC: The plaintiffs, Syarikat Perkapalan Selatan Sabah Sdn Bhd, filed an ex parte summons-in-chambers on 6 September 1990 seeking an order that the third defendants, whether by themselves or their agents or servants or any of them or otherwise howsoever be restrained by injunction from nominating or approving any vessel to carry logs for export from Sabah to any destination or in any manner holding themselves out as the authority to regulate the export or carriage of timber logs from Sabah until after the hearing of the originating summons herein or until further order.

Together with it was filed a certificate of urgency asking the court to hear the originating summons and summons-in-chambers urgently on the grounds:

(1) The plaintiffs are approved shipping agents and applications for approval as shipping agents are regularly submitted.
(2) Since July 1990, the third defendants have rejected the plaintiffs' application for approval without any reason.
(3) The plaintiffs' current approval as shipping agents will expire in October 1990.
(4) As a result of the above, the plaintiffs' business operations will be affected and have to cease operations in October 1990 unless the plaintiffs' application for injunction and declaration is heard expeditiously.

In the premises, Mr Gerald Math Lee Min, advocate and solicitor for the plaintiffs, pray that this honourable court will grant the plaintiffs an early date of hearing.

I decided in view of the matters deposed in the affidavits of the plaintiffs that 'it would be more appropriate to order an early hearing of the application rather than grant an injunction' (per Hashim Yeop A Sani CJ (Malaya) in *Associated Tractors Sdn Bhd* v *Chan Boon Heng & Anor*[1]). Accordingly I ordered that the matter be conducted inter partes and the papers be served on all parties in time.

Mention in chambers was fixed for 12 September 1990 whereupon counsel for the plaintiffs (Mr Gerald Math) and for the first and second defendants (Mr Juprin Wong Adamal from the State Attorney-General's Chambers) and for the third defendants (Mr Douglas C Primus) were present.

The hearing was set for 21 September 1990 but on the day before, the State Attorney-General's Chambers wrote in to say that they had no choice but to request a postponement as the documents necessary or related to this case had not been received from the departments concerned and some had been seized by the Anti-Corruption Agency. An early date was then fixed on 26 September 1990 for the hearing.

Based on the affidavit of the chairman of the board of directors of the plaintiff company, the hearing on 26 September 1990 was of the application by the plaintiffs for the following orders:

(1) as against the first and second defendants, a declaration that in issuing timber licence agreements and licences under the Forest Enactment 1968 the second defendant has no power to stipulate a condition that the licensee shall export timber through and by any vessel or vessels nominated and approved by the first defendant for the purpose to any destination and that any such condition in any timber licence agreements or licences issued or to be issued by the second defendant is ultra vires the Forest Enactment 1968 and is void and of no effect;
(2) a declaration that the appointment of the third defendant by the first defendant as the authority to nominate and approve vessels to carry logs for export from Sabah to any destination is unlawful, null and void and of no effect whatsoever;
(3) as against the third defendant, an injunction restricting and restraining the third defendant whether by themselves or their agents or servants or any of them or otherwise howsoever from nominating or approving any vessel to carry logs for export from Sabah to any destination or in any manner holding themselves out as the authority to regulate the export or carriage of timber logs from Sabah;
(4) costs; and
(5) any other order as the court may deem just.

When hearing commenced on 26 September 1990, counsel for the plaintiffs handed a further written submission. He raised an ancillary issue of locus standi of his clients vis-a-vis the applications for the orders.

Facts

Before going into the trial proper, it will help illuminate if the facts are outlined here briefly. On 30 September 1982, the State of Sabah Government Gazette published a notification under the Delegation of Powers Enactment 1963, delegation of powers under s 3:

> In exercise of the powers conferred upon me under s 3 of the Delegation of Powers Enactment 1963, I, Datuk Harris bin Mohd Salleh, Chief Minister, State of Sabah, hereby delegate the exercise of my powers under s 15 of the Forest Enactment 1968 to the Conservator of Forests to sign all the agreements pertaining to the amendment of all licence agreements insertion of the condition whereby the contractors agree to export all timber in any form, to any destination, through and by vessel or vessels nominated and approved by the government.
>
> Dated this 11th day of September 1982.

In compliance with that the Conservator of Forests (now redesignated as Director of Forestry) stipulated in timber licence agreements and licences issued under the Forest Enactment 1968, various conditions one of which reads as follows:

> 20 In the event that export quota are allocated to this licence, the licensee shall export all such timber through and by any vessel or vessels nominated and approved by the State Government for the purpose to any destination.

The effect of the condition is that all timber in any form must be exported through 'approved vessels' and such 'nomination and approval' shall be by the state government. This tallies with the gazette notification dated 30 September 1982.

The Warta Kerajaan Negeri Sabah published on 6 October 1988 a 'Timber Shipment Policy' which reads as follows:

> No 579 [No MNR 404/10/1 Vol V]
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> Timber Shipment Policy
> Appointment of Yayasan Sabah to approve and nominate vessel under licence agreements and timber licences
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> It is notified for general information that, for the purpose of the relevant clause in the various timber licence agreements entered into between the State Government of Sabah and the timber licensees concerned and in the various timber licences, the State Government of Sabah has appointed Yayasan Sabah with effect from 1 October 1988 to nominate and to approve vessels for and on behalf of the State Government of Sabah for the carriage of logs extracted from the respective licensed areas for export to any destination.
>
> Dated this 26th day of September 1988.
>
> William Shim
> Setiausaha Hasil Bumi

According to the third defendants, their appointment was by way of a power of attorney:

> By this power of attorney given on the 23rd day of November 1988 the State Government of Sabah (hereinafter called 'the government') hereby appoints Yayasan Sabah, a corporation solely incorporated under the Sabah Foundation Enactment 1966 (hereinafter called to as 'the attorney') the true and lawful attorney of the government for and in the name of and on behalf of the government to nominate and approve vessel or vessels for the purpose of exporting all logs and timber extracted from the respective licensed areas to any destination under the relevant provision of any existing and/or future timber licence or licences issued and/or to be issued by the government or any timber licence agreements entered into between the government and any licensee. This appointment shall take effect from 1 October 1988.

The plaintiffs maintained that whilst there does not appear to be any sanction for implementation of this condition, the effect of this condition means that in order to be able to carry timber logs from Sabah, foreign shipping companies would have to apply for their ships to be nominated and approved.

The plaintiff company complied with such a policy and had regularly submitted applications for ships of its principals to be nominated and approved by the third defendants. Until lately, the plaintiff company had no difficulty in obtaining approval for the ships it handles for this purpose.

Since the end of July 1990, the plaintiff company's applications for approval had been rejected by the third defendants without any reason. As a result of this the plaintiffs' foreign principals have informed them that they would withdraw all their business from the plaintiff company if they were unable to obtain such approvals from the third defendants. This could cause the plaintiff company 'irreparable damage' and the plaintiff company claims that it would have to close down.

There are three shipping agents approved by the customs authorities for carrying on business in Sabah as shipping agents for vessels carrying timber logs for export, namely, (i) Syarikat Perkapalan Selatan Sabah Sdn Bhd (the plaintiffs herein), (ii) SB Ocean Shipping Sdn Bhd, and (iii) Safond Shipping Sdn Bhd.

By reasons of they being the only approved customs shipping agents in Sabah, the state government would only consider nominations from them for approval of vessels.

Legal issues

The two legal issues which the plaintiffs' counsel wants the court to delve into are:

(i) Is the Director of Forestry entitled to impose the said condition in the timber licences issued by him?
(ii) Even if the said condition is valid, is the appointment of Yayasan Sabah lawful under the Forest Enactment?

Hence, the plaintiffs bring this action to challenge the validity of the condition imposed by the state government and the appointment of Yayasan Sabah as its agent.

Locus standi of plaintiffs

The plaintiffs' counsel forcefully urged on the court that his client has locus standi while counsel for the first and second defendants later in his submission raised this issue: Did the plaintiffs pause for a moment to re-examine their legal standing in initiating this case? In other words, asked Mr Adamal Wong, is the plaintiff an aggrieved party? For the plaintiff to have locus standi, he must show that he is a 'person aggrieved'. The words 'person aggrieved' is explained in the case of *Re Sidebotham, ex p Sidebotham*[2] at p 465:

> ... the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced, which has been an injury or grievance in respect of his property or otherwise.

The definition was also applied and approved in the case of *Burton & Ors* v *Minister of Housing and Local Government*[3] at p 413.

Probably in anticipation of that argument, Mr Math quoted *Government of Malaysia* v *Lim Kit Siang*[4] at p 20:

> What is the law on locus standi?
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> A clear statement of it was stated by Buckley J in *Boyce* v *Paddington Borough Council* [1903] 1 Ch 109 as follows:
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> 'A plaintiff can sue without joining the Attorney General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (eg where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.'

In answer to that Mr Adamal Wong quoted another passage of the same case by Salleh Abas LP:

> Under art 68(1) of the Constitution, the government can make contracts and can sue and be sued. In the making of a contract, s 2 of the Government Contract Act 1949 ensures that if the contract is reduced to writing it should be made in the name of the government and signed by a minister or a public officer authorized by a minister. There is nothing in the Constitution or in the Government Contract Act which imposes a legal duty on the government to consult and accept the views of any taxpayer or group of tax payers or to hear objections. There may be a moral and political obligation on the part of the government to be mindful of taxpayers' objection, but this is not a basis for the court to find a legal duty giving any taxpayer locus standi to maintain this suit. Such moral obligation should be addressed at other forums.

Hence I fail to see how the respondent, whether as a politician, a road and highway user or a taxpayer, could have locus standi.

Mr Math contended that as the plaintiffs are shipping agents, the condition imposed on licences by the state government that all vessels used for export of timber have to be approved does affect them. The plaintiffs in the present action carry on business as shipping agents. It is easy to see that the imposition of the condition that only ships nominated and approved by the state government may transport timber for export, can affect and interfere with the plaintiffs' private rights to carry on that part of their business. The procurement of export ships in Sabah is through shipping agents like the plaintiffs. By reason of the condition in question, the plaintiffs cannot in relevant instances enter into any shipping arrangements with any shipping companies without first getting the approval of Yayasan Sabah. The plaintiffs' counsel opines that the plaintiff's contractual right and freedom to enter into shipping and transport arrangements with a shipping company of its own choice is a private right. The imposition of the condition in question has taken away such a right.

Mr Math distinctly asserted that 'plaintiff has either to submit its ships for approval, or not carry on business at all. It does not have an alternative like the plaintiff in the *Lim Kit Siang* case.[4] The plaintiffs' right to free enterprise has been impeded.'

It is neither here nor there that timber licences are or are not issued to the plaintiff. The condition in question may be referable to a shipper of timber (ie a person in the plaintiff's situation) as opposed to the timber licence holders.

Similarly, any decisions by Yayasan (the third defendants) relating to the condition in question, whether favourable or not, is bound to affect the plaintiffs' business. The plaintiffs vigorously urged the court to believe that the decisions made by the Yayasan Sabah in the present case had in fact affected the plaintiffs' rights adversely. In *Tan Sri Othman Saat* v *Mohamed bin Ismail*[5] itself, which involved the application for a declaration, the fact that there was a failure to decide upon the plaintiff's application for land was a material factor in the court's decision that the plaintiff therein had the necessary locus standi to sue.

On all these grounds, and in Salleh Abas LP's definition, the plaintiffs have a genuine private interest to be furthered and protected. The plaintiffs' counsel ended his arguments by quoting Salleh Abas LP in *Lim Kit Siang*'s case[4] (at p 24):

> What is important about *Tan Sri Haji Othman Saat*'s case [1982] 2 MLJ 177 is that part of the judgment which dealt with the approach which the court should take when confronted with the question of locus standi. Here is what the court said:
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> 'The sensible approach in the matter of locus standi in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice.'

Counsel for the first and second defendants then enlightened the court regarding the types of licences issued under the Forest Enactment 1968:

> There are two types of licences which the government can issue. Firstly, a licence issued under s 24 and secondly, a licence issued under s 15 of the Enactment. The difference between these two licences deserves an explanation in order to appreciate how the Enactment works. Cited in support for this contention is the case of *Nam Seng Co* v *Wing Yew (Tawau) Co Sdn Bhd* [1978] 2 MLJ 198. In this case, Lee Hun Hoe CJ (Borneo) said on p 200:
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> 'It is very important to note the difference between ss 15 and 24. A licence issued under s 24 is personal to holder and not transferable in any manner whatsoever. Such a licence may be issued by the Conservator or his representative and does not require a licensee to counter sign on the licence. But, in the case of a licence agreement all parties concerned, including the minister, are required to sign as if the licence were an agreement which contains various terms and conditions. Under r 3 of the Forest Rules 1969 such a licence shall be in one of three forms set out in Schedule III of the Rules. But, no prescribed form is provided for a licence agreement issued under s 15.'
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> By a licence agreement issued under s 15 of the Enactment, the government entered into a contractual relationship with the party to the agreement, and such agreement is governed by contractual clauses and conditions. The power of the government to enter into a contract pursuant to s 15 of the Enactment has to be distinguished from the power to impose conditions in a licence under s 24 of the Enactment. Under s 24, conditions in a licence are imposed not by contractual agreements but by statutory power.

The defendants are unclear as to what right the plaintiffs are trying to enforce, but it could be inferred from the plaintiffs' affidavit that they are attempting to enforce a private right. The plaintiffs possess no legal right under the licence agreement. Were the plaintiffs attempting to enforce a public right? This point has been decided in the case of *Tan Sri Othman Saat* v *Mohamed bin Ismail.*[5] Is there any special or substantial interest which the plaintiffs have in the subject matter? If we read liberally the second limb of *Boyce* v *Paddington Borough Council*[6] at p 114, it must appear that 'everyone with a legitimate grievance' can apply for a declaration. Two other cases were canvassed — (i) *Periasamy a/l Sangili* v *Datuk S Samy Vellu*;[7] (ii) *Gregory & Anor* v *London Borough of Camden.*[8]

Mr Primus for the third defendants also questioned the locus standi of the plaintiffs and asked the same question: 'Is the plaintiff an aggrieved person?' He then quoted Lord Edmund Davies in *Gouriet* v *Union of Post*

Office Workers.[9] But he conceded the point when he continued with 'But the jurisdiction of the court is not to declare the law generally or to give advisory opinions: it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else' (per Lord Diplock in the same case).

So when the plaintiffs' applications for their ships to be 'nominated and approved' were rejected by Yayasan Sabah, 'Are the courts (as Lord Denning MR would ask) to stand idly by?' The answer to that comes from Lord Diplock who said 'Courts of Justice do not act of their own motion. In our legal system it is their function to stand idly by until their aid is invoked by someone recognized by law as entitled to claim the remedy in justice that he seeks.'

Are the plaintiffs (i) aggrieved persons?; or (ii) did they have some genuine interest in having their legal position declared?; or (iii) are they persons with a legitimate grievance?

There may be simple cases in which it can be seen at the earliest stage that the person applying for the declarations has no interest at all or no sufficient interest to support his application. Then it would be quite correct at the threshold to refuse him further consideration. This is a right which the courts must exercise as it is important as a safeguard against courts being flooded and public bodies harrassed by irresponsible applications. In our case, there is a thin line. The plaintiff company has been advised by counsel that the condition referred to above is ultra vires ss 15 and 24 of the Forest Enactment 1968 and that in law the conditions imposed in a timber licence must fairly and reasonably relate to the permitted purposes of the Forest Enactment 1968 and the Director of Forestry Sabah has no authority under the Forest Enactment 1968 to grant licences subject to a condition that is beyond the scope of the Enactment. If the said condition is void the appointment of the third defendant as the approving agent is also similarly void and of no effect.

The plaintiffs had also been advised that although the Director of Forestry Sabah may impose conditions for the issue of a timber licence, these conditions, to be valid, must fairly and reasonably relate to the objects of the Forest Enactment 1968. The Director of Forestry Sabah is not at liberty to use his power to impose conditions for an ulterior object, however desirable that object may seem to him to be in the public interest.

The powers of the Director of Forestry Sabah under s 4 of the Forest Enactment 1968 are limited to the administration of the forests of the State and the general superintendence of all matters within the provisions of the Enactment. Do such powers extend to matters beyond the forests? Once the timber is cut and removed, has the Director of Forestry Sabah any power to specify as to how such timber is to be shipped? We must bear in mind that the same section also specifies that such administration and superintendence shall be 'subject to the general or special directions of the minister'.

The plaintiffs are of the view that the power of the minister under the Forest Enactment 1968 is set out in s 4 thereof and that the appointment of the third defendant by the minister for the purposes of the Forest Enactment 1968 is unlawful and void as the minister has no power to appoint anyone who is not a forest officer to exercise powers under s 4(3) of the Forest Enactment 1968.

But a forest officer (Albert Radin) attached to the Jabatan Perhutanan, Sandakan, in his affidavit states that in any event, (i) the points raised by the plaintiffs in the above paragraphs pertain to points of law and, therefore, should not have been deposed to in the affidavit, and (ii) these points of law should be addressed during the hearing of the case. The parties may have misunderstood either O 18 r 11 or O 41 r 5 of the Rules of the High Court 1980 and I do not propose to deal more on this issue. Suffice if I say that the question of sufficient interest cannot, in many cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates. This, in the present case, necessarily involves the whole question of whether the state government of Sabah and/or the Director of Forestry Sabah has/have disregarded the rule of law and the determination of whether the Forest Enactment 1968 has been infringed.

The defendants did not raise locus standi as a preliminary objection but submitted it as a defence to the application by the plaintiffs. Though counsel for the third defendants had pressed on the preliminary question of whether the plaintiffs have 'sufficient interest' and submitted that the plaintiffs have no such interest, all I can say is that if the submission is correct, then the application must fail in limine (or just on the threshold).

Whether to grant declaration or reject applications: ultra vires or intra vires?

I am fortified in hearing this case as both sides have merits. The court is aware that all three counsel are firm believers in that every legal power must have legal limits, otherwise there can be dictatorship or chaos. Every discretion must be fettered or there can be abuse and corruption. And further, Raja Azlan Shah Ag CJ (as he then was) in *Pengarah Tanah & Galian Wilayah Persekutuan* v *Sri Lempah Enterprise Sdn Bhd*[10] said:

> In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should

not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. ... The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasize what has often been said before that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place' (per Danckwerts LJ in *Bradbury* v *London Borough of Enfield* [1967] 3 All ER 434 at 443).

Therefore, when a power vested in any authority, agency or department is exceeded, any act done in excess of the power is invalid as being ultra vires.

In *Palmco Holdings Bhd* v *Commissioner of Labour & Anor*,[11] Hashim Yeop A Sani SCJ (as he then was) explained the term 'ultra vires' as follows:

The term ultra vires in relation to a delegated legislation can be interpreted in a double sense. First it can mean that the rule or regulation in question deals with a subject not within the scope of the power conferred upon the delegated legislative authority. Second, it can also mean that although the delegated legislation in question deals with the proper subject, it has gone beyond the limits prescribed by the parent law. See also *Young* v *Tockassie* (1905) 2 CLR 470.

The preamble to the Forest Enactment 1968 reads as follows:

An Enactment to repeal and replace the law relating to the preservation of forests and the regulation and control of dealings in forest produce; and for matters connected therewith and incidental thereto.

and s 42(1)(c)(iv) of the Forest Enactment 1968 states:

(1) The Minister may make rules

(c) relating to the transport etc of forest produce, and in particular —

(iv) regulating the size and shape of log rafts, and the types of vessels used to move such rafts, either generally or in the case of any particular waterway, navigation channel or harbour, and regulating generally the transit of forest produce by land or water and by different means and classes of transport.

We must note that the section does not say if the minister can act on his own.

Some of the case authorities show that the court has been reluctant to annul conditions imposed by the administering authority unless the conditions are unreasonably alien to the objects of the statute. This principle forms part of the judgment in the case of *Pengarah Tanah dan Galian Wilayah Persekutuan* v *Sri Lempah Enterprise Sdn Bhd*[10] where Raja Azlan Shah Ag CJ (Malaya) (as he then was) stated that:

It is not the province of the courts to review the decisions of government departments merely on their merits. Government by judges would be regarded as a usurpation.

His Lordship then went on to quote the decision in *Fawcett Properties Ltd* v *Buckingham County Council*[12] as follows:

The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it.

This court is not asked to 'review the decisions' of the defendants nor to override their decision. The applications are in respect of contravention of law by or acting in excess of the powers by defendants.

I must warn myself that in considering whether I should or should not entertain the plaintiffs' application for the declarations I shall be mindful of what MP Jain has stated in his book The *Administrative Law of Malaysia & Singapore* (2nd Ed) at pp 497-498 as follows:

A declaration merely declares what the legal rights of the parties are. A declaratory order has no coercive force as such nor does it quash any decision which may have been taken by an administrative authority. It is a private law remedy being adapted to public law situations. The usefulness of declaration depends on the premise that a public authority will not disobey the law once it is discovered what the law is. But though a declaration has no coercive force it may effectively undermine the enforceability of an administrative act. For example, an order declared to be invalid does not have to be complied with as such an order cannot be enforced legally. Declaration is a wide ranging and flexible remedy and can be used in a 'wide range of circumstances' and a 'wide variety of cases in terms of subject matter' ...

The author went on to say at p 499:

In spite of the broad jurisdiction which the High Court possesses to issue declarations, the court has been extremely chary and reluctant to grant declarations in actual cases, and there are not many cases in which the plaintiffs have succeeded in obtaining declarations. In *Land Executive Committee of Federal Territory* v *Harper Gilfillan Ltd* [1981] 1 MLJ 234 the Federal Court has emphasized that though declaratory judgment is today 'the most important' means of ascertaining the legal powers of public authorities in the intricate mixture of public and private enterprise, yet the use of declaration 'must not be carried too far', that the power to grant declaration in lieu of the prerogative orders or statutory reliefs must be exercised with 'caution' and 'sparingly' and 'with great care and jealously'. To the same effect, observations are to be found in *Dato' Menteri Othman bin Baginda* v *Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29.

But of course that is an academic question. We today face reality. The questions which the plaintiffs demand answers to are:

Under the Forest Enactment only the Director of Forestry or any Forest Officer is empowered to exercise powers

under the Enactment. Even if there is a delegation it must be delegated to a forest officer.

It is therefore very clear that Yayasan Sabah cannot be appointed to undertake any duties or function under the Forest Enactment. From any point of view Yayasan Sabah has no role to play under the Forest Enactment and therefore there must be a permanent injunction to prevent Yayasan Sabah from exercising any such functions.

Similarly in our case the Enactment allows the Director to impose conditions relating to the use of forest reserves and cutting down of timber but it cannot regulate what a subsequent buyer of timber does with the timber. In other words it cannot regulate how the buyer of timber should ship its timber from Sabah. Any such purported condition must be void and ultra vires the Forest Enactment.

The cutting or removal of timber from a forest reserve is prohibited by the Forest Enactment. The Minister or Director can grant licences to cut or remove timber from a forest reserve, subject to conditions. Such conditions must be related to matters connected with the cutting or removal. For example, if the conditions stipulate that timber can only be shipped via Labuan to foreign destinations — such a condition would be ultra vires. Or that timber can only be sold through Yayasan Sabah — would such a condition be intra vires?

To that the first and second defendants' counsel says:

The preamble read in conjunction with s 42 of the Enactment leave no doubt as to the purview of the Enactment. The preamble or any section of the Enactment cannot be construed in isolation but must be read as a whole to fully understand the intent and spirit of the Enactment. The Enactment should be construed purposefully so that the objects behind the Enactment are achieved. The transportation or movement of forest produce whether by land or sea cannot be divorced from the purpose of the Enactment if the object of the Enactment is to regulate and control dealings in forest produce. Illegal shipment of logs is part and parcel of the whole offence of illegal logging and illegal felling. The preamble of the Enactment with particular regard to the dealings in forest produce is reinforced by s 42 of the Enactment which stipulated a power to make rules in respect of transportation by land or sea. Transportation by sea can be affected in various ways one of which, of course, is shipment. It would be bordering on the strange if the Enactment empowers the authority to regulate and control dealings in timber produce only up to the point where the land and sea meet and restrict the powers of the authority as soon as the logs dip on sea water. Where do we draw the line?

... Having come within the purview of the Enactment, it is humbly submitted that there is no longer a need for the court to review the merits of the decision of the government in formulating the condition to a licence agreement.

As for the nomination of the third defendants as the authority to 'nominate and approve ships', this was done by a power of attorney dated 23 November 1988.

On 11 September 1982 when the Chief Minister delegated his powers under s 3 of the Delegation of Powers Enactment 1963 it related only 'to power to sign all the agreements pertaining to the amendment of all licence agreements' wherein there will be an insertion of the condition of the timber shipment policy.

It is the first defendants who actually stipulated the condition in the licence agreement. What was delegated to the second defendants was merely the power to sign the licence agreement. The gazette of 11 September 1982 clearly states that the first defendants shall nominate and approve the ships.

Through a power of attorney dated 23 November 1988 the first defendants appointed the third defendants as the authority to carry out the nomination and approval of ships for and on behalf of the state government.

There is no power given by the first defendants to the third defendants to impose or stipulate any condition in any licence agreement.

Because the third defendants are not forest officers or a department of the first defendants, a power of attorney must have been deemed necessary. Hence the said appointment was made in that day.

There does not appear to be any delegation of power either by the first or second defendants to the third defendants. We need to realize the distinction between delegating powers and causing someone to act as one's attorney: in the case of the latter power is still being exercised by the principal although through donee, whereas in delegation of powers, the power is exercised by the delegate in his own name.

Counsel for the third defendants says:

If the plaintiff comes to this court of equity and seek equitable and discretionary remedies such as declarations and injunctions he must come with clean hands.

Have the third defendants really rejected the plaintiffs' applications for approval without any reason? The third defendants had on occasion rejected applications by both the plaintiffs and SB Ocean Shipping Sdn Bhd. The court was informed that when considering whether to approve an application for the nomination of vessels, the third defendant as the approving authority has to consider various aspects such as to balance and regulate the number of nominated and approved vessels in relation to the volume of logs for export which in 1990 rapidly decreased in comparison to 1989 and as John Stephen Fung had deposed:

I verily state there was no outright rejection of the applications made by the plaintiff. By a letter of reference PPS/KKK/C/0490/90 and 0491/90 dated 27 August 1990 and 28 August 1990, the plaintiffs applied for the nomination and approval of certain vessels for and on behalf of their principals. By a letter dated 7 September 1990, the third defendants duly approved the said nomination of the vessels concerned. ...

It must be noted that the plaintiffs had all this while complied with the timber shipment policy and accord-

ingly submitted applications for ships of its principals to be nominated and approved by the third defendants. But by July 1990 when its 'applications had been rejected by third defendants without any reason' it began to sit up and think of a legal recourse.

It is discernible that under the Forest Enactment 1968 the minister may impose additional conditions:

> 24A (1) Notwithstanding any provisions of this Enactment the Minister may, as and when he deems it necessary in the public interests, revoke or cancel a licence or licences or vary the conditions or impose such additional conditions upon such licence or licences entered into or issued under this Enactment.

And as the licence or licence agreement is issued by the Forest Department, that requirement of the law is satisfied. As stated above, the plaintiffs had previously complied with the conditions for some years. The specimens/exhibits B2-B7 provided by the plaintiffs are signed by the Pegawai Hutan Lingkungan.

I have not disregarded the plaintiffs' counsel's contention that 'shipping' comes under App IV of the Constitution where under Legislative Lists, shipping is stated at cl 9 as 'shipping and navigation on the high seas and in tidal and inland waters'. It must be observed that the first defendant (not second defendant) has authority under the List IIA regarding ports and harbours, other than those declared to be federal by or under federal law; regulation of traffic by water in ports and harbours or on rivers wholly within the state, except traffic in federal ports or harbours; foreshores and in List IIIA shipping under 15 registered tons, including the carriage of passengers and goods by such shipping; maritime and estaurine fishing and fisheries.

But the Forest Enactment 1968 mentions the 'regulating of ... types of vessels ... any particular waterway, navigation channel or harbour ... by land or water ...' — 42(1)(c)(iv). That being so, then the condition regarding the shipment of logs is incidental and part of s 42(1)(c)(i) which relates to the transport etc of forest produce and '... which may be exported from ... the State'.

What the first defendant has done and wishes to continue doing is to particularize certain ships whereupon the logs are prepared for shipment. Shipment is putting of goods etc ... on ships or the amount shipped or 'loading on board a ship ...' (see *Tsakiroglou & Co* v *Noblee Thorl*[13]). How the ships then behave after departure from Sabah ports is within federal responsibility. Is shipping different from shipment? There is a thin line but a clear one. And neither the twain shall blurr one another.

Conclusion

Under the circumstances I therefore rule that the condition regarding the shipment of logs is validly imposed and is not an infringement nor ultra vires the Forest Enactment 1968. I accept the contention of the first and second defendants' counsel at para 39 (above). I therefore reject the 'plaintiffs' application for the orders against the first and second defendants, in respect of a declaration in issuing timber licence agreements and licences under the Forest Enactment 1968. The second defendant has power to stipulate a condition that the licensee shall export timber through and by any vessel or vessels so nominated and approved; and such condition in any timber licence agreements or licences issued or to be issued by the second defendant is intra vires the Forest Enactment 1968 and is valid and shall have effect. The Director of Forestry is therefore entitled to impose the said condition in the timber licences issued by him.

In the application for an injunction against the third defendants, none of the parties cited (i) *American Cyanamid Co* v *Ethicon Ltd*[14] where it was held that for a grant of interlocutory injunction, 'all that was necessary was that the court should be satisfied that the claim was not frivolous or vexatious'. I am satisfied that in our present matter, the plaintiffs' claim is not frivolous or vexatious. In fact the plaintiffs' private right is affected; (ii) *Tinta Press Sdn Bhd* v *Bank Islam Malaysia Bhd*[15] where the Supreme Court held that an injunction before trial may be 'granted only in exceptional and extremely rare cases'. I am not aware of any authority for the proposition that an injunction could be granted to restrain acts likely to cause damage but which were not in any other respect unlawful. Characterizing an act as unfair is not sufficient to make it actionable. The question of an injunction prior to the hearing is now academic. But as has been explained in paras 27 and 31 above, it was not clear at the beginning whether an injunction could lie but the case became clearer as all the parties proceeded with their submissions and affidavits.

Is the appointment of Yayasan Sabah lawful under the Forest Enactment 1968? The appointment was not made under the Forest Enactment 1968 but rather by a power of attorney of Hasil Bumi Jabatan Ketua Menteri. Yayasan Sabah was appointed to nominate and approve vessels 'for and on behalf of the State Government of Sabah'. Can Yayasan Sabah, a body under the Yayasan Sabah Enactment 1966 and whose charitable objects are the advancement of education and the relief of poverty, accept the appointment of an attorney? The powers of the Yayasan Sabah Board include (see Yayasan Sabah Enactment 1966):

> 10 (1) The Board shall, in addition to any other powers conferred by this Enactment, have power:
>
> ...
>
> (cc) to apply for and acquire timber concessions and work the same either directly or through contracting out and to carry on other business which may seem to the Board capable of being conveniently carried on in connection with the above or calculated directly or

indirectly to enhance the value or render profitable any of the Board's property or rights;

(o) to carry on the business of carriers by air, sea, river, canal, railway, road and otherwise;

Nowhere is there any mention that it can exercise powers under the Forest Enactment 1968. On the contrary, the powers stated above may place the board or the Yayasan Sabah in conflict with the powers to 'nominate or approve vessels' which comes under one of the conditions imposed by the Forest Enactment 1968. Section 42 of the Forest Enactment 1968 only empowers the minister to make rules. If we re-read para 41 above, we see that Yayasan Sabah has played a role under the Forest Enactment. It is implicit in the Forest Enactment that the administration of the forests and general superintendence of all matters within the provisions of the Enactment must rest with the Director of Forestry and all duties (eg in implementing forestry policies and execution of forestry plans as well as the penal aspects for non-observance of the Forest Enactment 1968, eg any condition or its breaches) rest with 'forest officers'. On the laws available (and these are laws enacted by the legislature of the state of Sabah), it is ultra vires the Forest Enactment of Sabah for the Setiausaha Hasil Bumi of Sabah to have appointed Yayasan Sabah as its donee to 'nominate and approve vessels' in respect of the condition under the Forest Enactment. The minister (not the Setiausaha Hasil Bumi) may, by notice in the Gazette, invest any other forest officer with all or any of the powers conferred on the Director of Forestry by the Enactment (s 4(3)) but only 'forest officers' (see para 39 above). And a forest officer means any person appointed under s 3 of the Forest Enactment 1968. As has been clearly explained by counsel for the first and second defendants (see para 39 above) the intent and spirit of the Forest Enactment 1968 is to achieve the objects therein. I take it that the Forest Enactment 1968 is a consolidating statute. See para 35 (above) for its preamble — which states the facts or reasons which had made the passing of the Enactment desirable. The purpose of a consolidating enactment is to present the whole body of the statutory law on a subject in complete form (44 *Halsbury's Laws of England* (4th Ed), para 809). In other words, everything regarding forests, its produce and management, transportation, regulating of sawmills and fees chargeable as well as ensuring that conditions are observed are within the Forest Enactment 1968. Additionally, this is a case for the application of the maxim 'generalia specialibus non derogant'.

If indeed it was intended that the Yayasan Sabah or its officers or agents exercise the powers of the forest officers, this should have been clearly spelled out when the Forest Enactment 1968 was enacted by the legislature of the state of Sabah three years after the Yayasan Sabah Enactment 1966. Normally an enactment cannot dictate the form of subsequent legislation. There is a strong presumption that the legislature does not make mistakes. If blunders (or omissions) occur in legislation, these must be corrected by the legislature. However, as there is no mention of Yayasan Sabah or that 'others' apart from forest officers can function or administer under the Forest Enactment 1968, and being mindful of the law that I cannot grant an injunction, I declare and rule that the appointment of the third defendants by the Setiausaha Hasil Bumi purportedly on behalf of the state government of Sabah or first defendant as the authority to nominate and approve vessels to carry logs for export from Sabah to any destination is unlawful, null and void and of no effect whatsoever.

Following from there, I now grant as against the third defendant, an injunction restricting and restraining the third defendant whether by themselves or their agents or servants or any of them or otherwise howsoever from nominating or approving any vessel to carry logs for export from Sabah to any destination or in any manner holding themselves out as the authority to regulate the export or carriage of timber logs from Sabah.

Subject to the usual undertaking of plaintiffs as to damages, if any, in the event the injunction is set aside, I shall make no order as to costs.

Order accordingly.

Solicitors: *Shelley Yap Leong Tseu Chong Chia & Co; Lee & Thong Co.*

Reported by *PS Ranjan*